

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ERIC E. QUINTON,

vs.

I. CLAY, Warden,

Petitioner,

Respondent.

CASE NO. 07cv0361-LAB (WMc)

**ORDER ADOPTING REPORT
AND RECOMMENDATION; AND**

**ORDER DENYING PETITION;
AND**

ORDER RE: DISCOVERY

Petitioner, a prisoner proceeding *pro se*, filed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (the "Petition"). This matter was referred to Magistrate Judge William McCurine for report and recommendation pursuant to 28 U.S.C. § 636 and Civil Local Rule 72.1(d). Respondent moved to dismiss, and supported their motion with lodgments. On November 28, 2007, Magistrate Judge McCurine issued his report and recommendation (the "R&R") finding Petitioner had waited over one year after his state conviction became final to file his first state habeas petition. The R&R therefore concluded the Petition was barred under the Antiterrorism and Effective Death Penalty Act's one-year limitations period. See 28 U.S.C. § 2244(d)(1). The R&R therefore recommended denying the Petition with prejudice. The R&R notified Petitioner of his right to object, and cautioned him that failure to object within the time permitted might waive his appellate rights. (R&R at 20:1–5.)

1 Petitioner filed objections to the R&R (“Objections”), which the Court has reviewed.
2 Petitioner does not dispute the R&R’s conclusion that his conviction became final on
3 September 14, 2004 and the one-year limitations period therefore began to run on
4 September 15, 2004. (R&R at 4:13–18.) The R&R also found Petitioner filed his first
5 habeas petition in California state court on October 14, 2005, well over a year later. (*Id.* at
6 18–19.) The R&R also found he filed a second petition (the “Disputed Petition”) in state
7 court on December 12, 2005. (*Id.* at 21–22.) Although Petitioner’s objections are lengthy,
8 his principal argument is that the Disputed Petition was actually his first petition, and that
9 he delivered it to a correctional officer for mailing on August 30, 2005. Secondly, he
10 argues he is entitled to equitable tolling, because of general delays caused by the prison
11 mailing system. Except for certain pages in Lodgment 7, Petitioner does not dispute the
12 authenticity of any of the lodgments, nor did he object to Judge McCurine’s reliance on
13 them.¹

14 If the R&R is correct, the Petition is time-barred under the limitations period set forth
15 in § 2244(d)(1). If, however, Petitioner delivered the Disputed Petition to a prison official for
16 mailing to the state court on August 30, 2005, as he argues, he is entitled to tolling from that
17 date. See § 2244(d)(2) (“The time during which a properly filed application for State
18 post-conviction or other collateral review with respect to the pertinent judgment or claim is
19 pending shall not be counted toward any period of limitation under this subsection.”); *Huizar*
20 *v. Carey*, 273 F.3d 1220, 1223 (9th Cir. 2001) (holding that a prisoner’s federal or state
21 habeas petition is deemed filed at the time he delivers it to the prison authorities for
22 forwarding to the court clerk) (citation omitted). If Petitioner is entitled to tolling, the Petition
23 would be timely under § 2244(d)(1).

24 The parties do agree the Disputed petition was dated August 30, 2005. Initially, the
25 burden falls on Respondent to show this was not the true mailing date. *Washington v.*

27 ¹ Petitioner did object that he had not received copies of the lodgments, but he was
28 served with a full set in time to file his Objections. His objections assume the authenticity
of all lodgments except Lodgment 7, into which he maintains additional documents have
been inserted.

1 *United States*, 243 F.3d 1299, 1301 (11th Cir. 2001) (per curiam) (“Under the mailbox rule,
2 the burden is on prison authorities to prove the date a prisoner delivered his documents to
3 be mailed. Absent evidence to the contrary in the form of prison logs or other records, [the
4 court] will assume that [petitioner's] motion was delivered to prison authorities the day he
5 signed it”) (citation omitted). In this case, Respondent has submitted evidence in the
6 form of mail logs, declarations, and other documents, which the R&R discusses.

7 Unfortunately for Petitioner, the state courts made a finding in this regard. In ruling
8 on the Disputed Petition, the Superior Court found it to be a second petition, and relied on
9 this finding in denying the Disputed Petition. The Court of Appeal relied on the Superior
10 Court’s finding to reach the same conclusion.

11 Under § 2254(e)(1), findings of fact by state courts are presumed correct and can only
12 be set aside on clear and convincing evidence.² Petitioner points to two pages of the mail
13 log (Obj. to R&R, Ex. A; Resp.’s Lodgment 19 at 1, 15), indicating two pieces of mail were
14 sent by him to someone in the District Attorney’s office and to the Superior Court on
15 September 2, 2005. In addition, his Objections, which he submitted under penalty of perjury,
16 offer his own representations regarding when he mailed the Disputed Petition. This
17 evidence favors Petitioner because it shows he did mail two items around the time he said
18 he did to the Superior Court and the District Attorney’s office, respectively.

19 Petitioner’s state habeas petition filed October 14, 2005 mentions a habeas petition
20 filed August 30, 2005, and purports to amend it. (Lodgment 5 (Notice and Notice of Motion
21 amending habeas petition, dated Oct. 5, 2005) at 1:20–22 (“Petitioner is aware that a prior
22 petition for writ of habeas corpus was filed into court August 30, 2005”)) In two
23 documents filed with the Superior Court, both dated October 30, 2005 and file-stamped
24 November 8, Petitioner again says he mailed his petition on August 30. (Lodgment 7 at
25 154–55, 158–59.) While not conclusive, these three documents favor his position. The

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27 ² This is not a case where the state court is alleged to have made unreasonable
28 findings of fact in light of the evidence before it, see *Taylor v. Maddox*, 366 F.3d 992, 999
(9th Cir. 2004). Rather, as noted below, Petitioner never presented the evidence to the state
courts he now presents to this Court.

1 Superior Court, however, said it had received no such petition (Lodgment 6 at 2:4–5), and
2 Petitioner never mentioned it in subsequent petitions filed with the Court of Appeals or
3 Supreme Court. (See Lodgments 9 (state Court of Appeal petition), 11 (state Supreme
4 Court petition).) Bearing in mind the Superior Court’s decision, and the Court of Appeal’s
5 decision denying the Disputed Petition as a successive petition, Petitioner had an incentive
6 to explain to the Supreme Court why the Disputed Petition was actually his first petition.

7 The same mail log also shows Petitioner mailed two items, to the same attorney in
8 the District Attorney’s office and to the same division of the Superior Court again on
9 December 8, 2005. (Lodgment 13 at 17, 20). These entries are annotated to show the
10 material is dated August 30, 2005. (*Id.*) Among the lodgments is a photocopy of the
11 envelope Petitioner mailed the Disputed Petition in; a copy of this is also included as
12 Attachment 1 to Respondent’s motion to dismiss and as Exhibits 1 and 2 to Respondent’s
13 reply to the opposition to the motion to dismiss. Petitioner accepts this as genuine and relies
14 on it in his Objections.

15 The face of this envelope bears two postage labels bearing the date December 8,
16 2005. The return address gives Petitioner’s location as 1-4-124-Low, which Petitioner says
17 was his location on August 30 but not on December 8. (Obj. at 16:11–20.) He argues this
18 would have been corrected if it were inaccurate. The envelope is addressed to “District
19 Attorney Ms. Shess, South Bay Superior Court(s).” This envelope contained the Disputed
20 Petition, which the Superior Court denied on February 23, 2006. (Lodgment 8.) On the
21 reverse appear the date “8/30/05” and what purports to be the signature of Officer David
22 Villalva, who was responsible for accepting prisoners’ mail. (Reply to Opp’n to Mot. to
23 Dismiss, Ex. 2.) Respondent submits the declaration of Officer Villalva, who states the
24 signature is not his nor does he sign prisoner mail in this fashion. (*Id.*, Ex. 3.) Officer
25 Villalva’s signature on his declaration and the signature on the envelope are noticeably
26 different, as are the handwritten numbers. (*Id.*, Ex. 2.)

27 Petitioner flatly denies giving the Disputed Petition, or a copy of it, to Officer Villalva
28 for mailing in December, 2005. (Obj. at 6:26–28 (“ . . . Petitioner did not mail these

1 documents on December 8, 2005; he mailed these documents on August 30, 2005.”)
2 Rather, his position is that he submitted only one copy of the Disputed Petition on August
3 30, but for reasons beyond his control or knowledge the mailing was delayed until
4 December. This is a substantial assertion, because the Disputed Petition includes
5 documents dated after August 30, which Petitioner explains by stating these documents
6 were from an entirely different filing but were deliberately misnumbered so as to mislead the
7 Court. (Obj. at 3:7–14.) These newer documents, if they were included with the Disputed
8 Petition, would show it the Disputed Petition was not delivered to Officer Villalva for mailing
9 on August 30.

10 If Petitioner mailed the first copy of his Disputed Petition on August 30 and a
11 replacement copy in December after learning it had not been received, it might explain a
12 great deal. Under this scenario, Petitioner’s filing would have been complete on August 30,
13 2005 when he handed his petition to Officer Villalva for mailing to the court. For unknown
14 reasons, neither the Superior Court’s copy nor the District Attorney’s copy ever arrived, but
15 whatever the reason, the limitations period would have been tolled as of August 30. This
16 scenario is not possible under either party’s version of the facts, however.

17 Given the evidence as it now exists, one possible conclusion is that Petitioner actually
18 gave the Disputed Petition to Officer Villalva for mailing on August 30, 2005, but it was held
19 and not mailed until December 8, 2005. Two entries for each piece of mail might have been
20 generated for each piece of mail — one on September 2, and another on December 8. The
21 December 8 notations “T/W 8/30/05,” rather than standing for “typewritten” and “backdated
22 to August 30, 2005” as Respondent argues, would actually stand for “trust withdrawal dated
23 August 30, 2005.” Under this scenario, the post-August 30 documents attached to the
24 Disputed Motion might be explained as a recordkeeping accident by the state court.

25 A second possible conclusion is that the mail log entries for September 2, 2005 reflect
26 something else besides the Disputed Petition being mailed, perhaps something the District
27 Attorney and Superior Court would have taken no notice of and discarded. Petitioner might
28 have done this by accident, only realizing his mistake in December, when he discovered his

1 unmailed petition. Petitioner also might have done this by design, as a way of buying himself
2 more time to submit his petition. Either he or an accomplice then forged Officer Villalva's
3 signature on the envelope, added the false date, and mailed the Disputed Petition without
4 prison officials noticing the erroneous information on the envelope.

5 In federal habeas proceedings, the Court must presume the correctness of factual
6 determinations by the state court. *Cooper v. Brown*, 510 F.3d 870, 919 (9th Cir. 2007). This
7 applies both to explicit and implicit findings. *Id.* (citing *Marshall v. Lonberger*, 459 U.S. 422,
8 433 (1983)). In ruling on what it considered the first petition, the Superior Court said it had
9 no record Petitioner had filed the Disputed Petition on August 30, 2005 as he maintains.
10 (Lodgment 6 at 2:3–5.) Later, when ruling on the Disputed Petition, the Superior Court found
11 it was filed on December 12, 2005. (Lodgment 8 at 2:12–14.) Relying on this finding, the
12 Superior Court denied the Disputed Petition. (*Id.* at 3:6–8 (finding Petitioner had not raised
13 his claims either on appeal or in his first petition and thus was “engaging in piecemeal
14 litigation”).) The Court of Appeal adopted the Superior Court's findings along with the rest
15 of its reasoning. (Lodgment 10.) The Court therefore presumes these findings are correct,
16 unless Petitioner rebuts them by clear and convincing evidence. 28 U.S.C. § 2254(e)(1)

17 Although Petitioner had access to most or all of the same evidence as is before this
18 Court when the matter was before the state courts, there is no record he ever brought it to
19 their attention even though he knew they considered the Disputed Petition to be a
20 successive petition and were denying it on that basis. Even if the state courts did not
21 consider the same evidence, Petitioner could have asked them to rely on it.

22 Clear and convincing evidence is evidence that, when viewed as a whole, creates an
23 abiding conviction that the truth of its factual contentions is highly probable. *Colorado v.*
24 *New Mexico*, 467 U.S. 310, 316 (1984). Although Petitioner requests an evidentiary hearing,
25 “an evidentiary hearing is not required [either] on issues that can be resolved by reference
26 to the state court record,” *Totten v. Merkle*, 137 F.3d 1172, 1176 (1998), or else where the
27 petitioner has failed to present clear and convincing evidence to rebut the state court's
28 factual findings. See *Schriro v. Landrigan*, 127 S.Ct. 1933, 1940 (2007) (citing with approval

1 Clark v. *Johnson*, 202 F.3d 760, 767 (5th Cir. 2000) and *Campbell v. Vaughn*, 209 F.3d 280,
2 290 (3d Cir. 2000)).

3 The Court finds the evidence on the disputed issue of when Petitioner first filed his
4 Disputed Petition is in equipoise. Given this state of the evidence, Petitioner has not
5 presented clear and convincing evidence the state courts' factual findings were incorrect.
6 For this reason, the Court must accept the state courts' finding that Petitioner filed the
7 Disputed Petition in December, 2005, well after AEDPA's limitations period had run.

8 Petitioner presents no other adequate grounds for tolling of the one-year limitations
9 period. The Court therefore **ADOPTS** the R&R and **DENIES** the Petition **WITHOUT**
10 **PREJUDICE**.

11 Currently pending before Magistrate Judge McCurine is Petitioner's motion for
12 discovery, filed *nunc pro tunc* to December 20, 2007, the same day Petitioner filed his
13 Objections. This discovery motion seeks documents by which Petitioner believes he can
14 show he filed the Disputed Petition on August 30, 2005.

15 The Court construes this as a motion for leave to file a motion for reconsideration
16 under Fed. R. Civ. P. 59 of this order, the holding of which Petitioner apparently anticipated.
17 The Court has reviewed the pleadings on Petitioner's motion for discovery and, finding good
18 cause, **GRANTS** the motion in part with respect to production of Petitioner's trust account
19 records and the housing unit logs. Magistrate Judge McCurine shall supervise discovery,
20 and all matters pertaining to discovery are referred to him. Respondent shall respond to the
21 discovery request within **15 calendar days from the date this order is entered**. After he
22 responds to the discovery requests, the parties shall participate in a follow-up conference
23 with Magistrate Judge McCurine. Counsel for Respondent shall contact Judge McCurine's
24 chambers to schedule this conference and shall arrange for Petitioner to participate
25 telephonically. The follow-up conference is to take place no later than **30 calendar days**
26 **from the date this order is entered**.

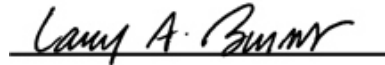
27 Petitioner's implied request to file a motion for reconsideration based on any evidence
28 he may uncover is **DENIED WITHOUT PREJUDICE**. In the event Petitioner obtains what

1 he considers to be clear and convincing evidence showing the Disputed Petition was filed
2 on August 30, 2005, Petitioner is **ORDERED** first to file a motion for leave to seek
3 reconsideration as required under ¶ 4(j) of the Court's own standing order. His motion must
4 summarize in five pages or less his argument and he must lodge (but not file) his proposed
5 motion and all supporting documents. If Petitioner wishes to seek leave to file a motion for
6 reconsideration, he must do so no later than **60 calendar days from the date this order**
7 **is entered.**

8 **If Petitioner does not seek leave to file a motion for reconsideration within the**
9 **time permitted, or if his request for leave is denied, the Petition will be denied with**
10 **prejudice, without further notice to Petitioner.**

11
12 **IT IS SO ORDERED.**

13 DATED: March 14, 2008

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15 **HONORABLE LARRY ALAN BURNS**
16 **United States District Judge**